United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

[redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[redacted]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

[redacted]

DAVID C. [redacted]

I N D E X

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1312

UNITED STATES OF AMERICA,
Appellee

v.

VINCENT INGENITO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

1. Whether the trial judge correctly instructed the jury on the defense of entrapment.

2. Whether a Department of Justice Strike Force attorney, assigned to conduct any kind of grand jury proceedings, was properly authorized to conduct the grand jury inquiry here even though the statute upon which the indictment was returned was not specifically mentioned

in the authorization letter and, if not, whether the indictment returned was invalid.

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. §515(a) provides:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

28 U.S.C. §543 provides:

> (a) The Attorney General may appoint attorneys to assist United States Attorneys when the public interest so requires.
>
> (b) Each attorney appointed under this section is subject to removal by the Attorney General.

Rule 6(d), Federal Rules of Criminal Procedure, provides in pertinent part:

> Who May Be Present. Attorneys for the government, the witnesses under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device may be present while the grand jury is in session . . . .

Rule 54(c), Federal Rules of Criminal Procedure, provides in pertinent part:

> Application of Terms. As used in these rules the following terms have the designated meanings.
>
> * * *

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney . . . .

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, defendant was convicted of having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). He was sentenced to 3 years' imprisonment.

At trial the evidence showed that in June 1974, one Frank DuBois (a/k/a Davis), a government informant, told federal authorities in Brooklyn that defendant, who was not a licensed firearms dealer, was offering guns for sale (Tr. 19, 61, 133). On June 20, 1974, federal undercover agent Bartholomew Aversano went to a Brooklyn parking lot, where DuBois introduced him to defendant as "Tony" (Tr. 20, 30). After some bargaining, defendant sold the agent a .22 Smith & Wesson revolver and 55 rounds of ammunition for $200 cash. Defendant told Agent Aversano that he might be able to get him .45 and .38 caliber handguns and discussed obtaining machine guns. Before they parted,defendant and the agent arranged to meet again on June 24, 1974 (Tr. 22).

On June 24 defendant met Agent Aversano at the parking lot and sold him a 7.65 mm Bohmisch Waffenfabrik pistol

for $164 cash (Tr. 25-26). They discussed the possible sale by defendant of a .45 automatic for $225, and defendant said that he would also have a .38 for Aversano the next time they met. Defendant further told the agent that a machine gun was available for $800 (Tr. 27).

There were no further meetings between defendant and Agent Aversano. However, on July 15, 1974 defendant discussed firearms in the same parking lot with another federal undercover agent, Barry Abbott. Defendant asked Abbott to accompany him the next day to pick up guns at the home of a person who was holding them for him. The agent never went there with defendant, who was subsequently arrested (Tr. 37, 63-65).

Testifying in his own behalf, defendant admitted having sold the guns and ammunition on June 20 and 24, 1974 (Tr. 96), but denied telling Agent Aversano that he could obtain a machine gun or asking Agent Abbott to accompany him to pick up guns (Tr. 100, 104). He further testified that he sold the guns on June 20 and 24 as a favor to DuBois and claimed that the informant had supplied him with the weapons (Tr. 96).

In rebuttal DuBois denied having furnished defendant with guns and described how defendant, in his presence, had obtained the weapons from a third person outside a Brooklyn tavern. DuBois explained that he had notified

federal agents when defendant asked him to help find buyers for the firearms (Tr. 130, 133, 136).

ARGUMENT

I. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFENSE OF ENTRAPMENT

Defendant asserts that his conviction should be reversed because the trial judge's entrapment instruction did not charge the jury to acquit if they found that DuBois, the government informant, had supplied the firearms. However, United States v. Russell, 411 U.S. 423 (1973) forecloses that contention. In that case the defendant was convicted for the illegal manufacture and sale of a drug he made using a scarce chemical ingredient supplied by a government undercover agent. Notwithstanding that the chemical was difficult for private individuals to obtain and indispensable to the defendant's crime, the Supreme Court ruled (411 U.S. at 432) that the government's conduct had fallen "far short" of violating due process. As this Court recognized in United States v. Rosner, 485 F.2d 1213, 1223 (2nd Cir. 1973), cert. denied, 417 U.S. 950 (1974), which affirmed a bribery conviction despite the fact that a government agent had furnished the defendant with grand jury minutes that were vital to the criminal enterprise, after Russell it is

"untenable" to argue that the defendant is necessarily entrapped where the government supplies the means for commission of a crime.

Defendant relies on decisions in the Fifth Circuit (e.g. United States v. Mosley, 496 F.2d 1012 (5th Cir. 1974); United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971)) and the Third Circuit (United States v. West, 511 F.2d 1083 (3rd Cir. 1975)) which hold that due process forbids conviction of a defendant for selling contraband procured from a government agent or informant, even though the defendant was predisposed to commit the offense. We submit that those decisions are wrongly decided and inconsistent with the Supreme Court's decision in Russell, which declined to define the defense of entrapment in terms of overzealous law enforcement activity and emphasized the predisposition of the defendant to commit the crime.[1/] As the Supreme Court held

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1/Other courts of appeals have rejected the notion that the supplying of contraband by a government agent constitutes entrapment per se or otherwise bars the defendant's conviction. See Hampton v. United States, 507 F.2d 832 (8th Cir. 1974), cert. granted, 420 U.S. 1003 (1975) (No. 74-5822); United States v. McGrath, 494 F.2d 562 (7th Cir. 1974); United States v. Jett, 491 F.2d 1078 (1st Cir. 1974). Cf. United States v. Rosner, supra; United States v. Johnson, 484 F.2d 165 (9th Cir. 1973), cert. denied, 414 U.S. 1112 (1973). See also United States v. Hayes, 477 F.2d 868 (10th Cir. 1973).

in Russell (411 U.S. 436):

> It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

In any event the cases cited by defendant are readily distinguishable because they involve contraband narcotics. Indeed, in Mosley and Oquendo, supra, the Fifth Circuit specifically distinguished Russell on the ground that there the government had furnished a legally obtainable chemical ingredient rather than inherently unlawful contraband. 496 F.2d at 1016; 490 F.2d at 163-164. In the instant case, the firearms, like the chemical in Russell, were legally available items although necessary for commission of the offense. Defendant's criminality arose, not from any inherent illegality in the weapons, but from the fact that he dealt in them without the required license. Hence, even under the precedents cited by defendant, the supplying of the firearms by the government would constitute proper investigative technique. 2/

2/In Hampton v. United States, supra, it is our position in the Supreme Court that contraband narcotics fall within the rule of Russell and that defendants convicted of selling drugs procured from government agents are not necessarily entrapped. However, since the instant case does not involve inherently unlawful merchandise, there is no reason to defer disposition of this case until Hampton is decided.

Here the trial judge carefully instructed the jury on defendant's entrapment defense (Tr. 221-224, 238-240, 259-262), charging them to acquit if they had a reasonable doubt that defendant was predisposed to commit the offense and did so only because of inducement or persuasion by government agents. The instruction specificialy dealt with the possibility that defendant had been entrapped by the informant DuBois (Tr. 223-224):

> A person who is arrested by the Government and subsequently agrees to work as an informant with the Government or its agents, while he may not be an official employee of the Government, is considered an agent of the Government for the purpose of this entrapment defense.
>
> Mr. DuBois can be considered by you as part of the Government apparatus for this purpose.
>
> If you find that the defendant Vincent Ingenito had no predisposition to deal in guns and that it was Frank Davis or DuBois, the Government informant, who enticed or entrapped him into the activity charged in the indictment, then you should properly find the defense of entrapment by a Government agent has been established.
>
> Remember, the defendant testified that DuBois talked him into doing this and DuBois testified that that is not at all how it occurred. Obviously, an important aspect of your work in the jury room is to determine the credibility of the witnesses before you in weighing their testimony.

That charge was in accord with the law in this Circuit (See United States v. Rosner, supra, 485 F.2d at 1223) and the Supreme Court's holding in United States v. Russell, supra. Especially in view of defendant's failure to object to the instruction given or to request the charge for which he now contends (See Lopez v. United States, 373 U.S. 427, 436 (1963); F.R.Crim.P. 30), there is no reason for this Court to reverse defendant's conviction on the ground that the entrapment instruction was deficient.

II. A STRIKE FORCE ATTORNEY, ASSIGNED TO CONDUCT ANY KIND OF GRAND JURY PROCEEDINGS, WAS PROPERLY AUTHORIZED TO CONDUCT THE GRAND JURY INQUIRY HERE EVEN THOUGH THE STATUTE UPON WHICH THE INDICTMENT WAS RETURNED WAS NOT SPECIFICALLY MENTIONED IN THE AUTHORIZATION LETTER. IN ANY EVENT, THE INDICTMENT SIGNED BY THE UNITED STATES ATTORNEY WAS VALID.

1. Defendant argued in a pretrial motion to dismiss the indictment and now contends on appeal that the indictment signed by the United States Attorney is invalid on the ground that Department of Justice Organized Crime Strike Force attorney David J. Ritchie exceeded his authority in conducting the grand jury inquiry. His argument is bottomed on the fact that the letter of authorization filed by Ritchie listed twenty-eight specific statutes but not 18 U.S.C. 922(a)(1), the statute that the defendant was charged with violating.

The first paragraph of the letter of authorization given to Ritchie on September 28, 1972 by Assistant Attorney General Henry E. Petersen directs him "to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested" and "to conduct in the Eastern District of New York . . . any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct." The second paragraph states that the Department of Justice has received information that persons and organizations unknown have violated federal laws in the Eastern District and refers to 27 substantive statutes, the conspiracy statute (18 U.S.C. 371), as well as "other criminal laws of the United States."

In arguing that the failure of Ritchie's letter to mention 18 U.S.C. 922(a)(1) is fatal to the indictment, defendant places great reliance on the memorandum and order of Customs Court Judge James L. Watson, sitting by designation as a United States District Judge, in United States v. O'Gorman, 73 Cr. 440 (E.D.N.Y. 1975) (App. E). In O'Gorman, Judge Watson dismissed the indictment because the letter of the Strike Force attorney who conducted the grand jury investigation, similar to the letter at

issue here, did not mention the specific statute under which the defendant was indicted. Choosing to construe the letter narrowly, Judge Watson ruled that the explicit terms in the letter regarding "other criminal laws of the United States" were surplusage and "at best . . . might support the inclusion of crimes related in some manner to those enumerated" (App. E p. 4). In reaching that result, the judge relied on the statement in this Court's decision in In re Persico, No. 75-2030 (2nd Cir., decided June 19, 1975), slip op. 4172, that "the government faces a danger when commissions are too specific and narrow."

We submit that the ruling in O'Gorman and defendant's contention here are at odds with the law of this Circuit, as articulated in Persico, supra. Under 28 U.S.C. 515(a) "any officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding . . . including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct . . ." Persico upheld an indictment returned after a grand jury inquiry conducted by a Strike Force attorney whose authorization letter stated his authority in "broad and general terms" (slip op. 4133). This Court characterized the question as "only a problem

of the form of paperwork involved in assigning Strike Force attorneys" (slip op. 4182) and held that although 28 U.S.C. 515(a) requires that a Strike Force attorney be "specifically directed" to conduct grand jury proceedings, such a specific direction "need not be embodied in a single written authorization, but may be implied from other writings, guidelines, practices and oral directions transmitted through a chain of command within the Department" (slip op. 4178-4179). The Persico opinion emphasized that Section 515(a) "should be read to support an indictment whenever it is reasonable to do so" (slip op. 4173) and "should not be so niggardly construed as to interfere with the federal government's ability to effectively administer its criminal laws" (slip op. 4174).

Judge Watson's ruling in O'Gorman ignores the basic teaching of Persico that a Strike Force attorney's authority should be interpreted to sustain an indictment whenever possible in order not to interfere with the administration of justice. The Persico opinion recognized that specific limiting provisions in a particular letter might pose problems for the government--for example, where a special attorney files an information when his letter only mentions grand jury proceedings (see United States v. Cohen, 273 F.2d 620 (D. Mass. 1921) or operates in a district

other than those specified (see United States v. Huston, 28 F.2d 451, 456 (N.D. Ohio 1928) (slip op. 4172). However, this Court stated that the legislative history and legal precedent supported a broad interpretation of the authority of a Strike Force attorney wherever it is reasonable to do so. Persico, supra, 4173. Accord, United States v. Wrigley, 520 F.2d 362 (8th Cir. 1975). Indeed Persico quoted with approval the conclusion of United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 256-257 (D. Md. 1931) that an omission from an authorization letter of the particular federal statutes allegedly violated was "a mere matter of form and not of substance." Persico, supra, 4170.

Here, despite the lack of specific reference to 18 U.S.C. 922(a)(1), attorney Ritchie's letter can easily be read as permitting him to conduct the grand jury inquiry which resulted in defendant's indictment, and this Court should so interpret it. The letter (App. D) directed the Strike Force attorney "to conduct . . . any kind of legal proceeding . . . including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct." Under this language, Ritchie could conduct a grand jury inquiry in the same manner as a United States Attorney and, we submit his role was not restricted to the statutes listed.

The letter, to be sure, also stated that Ritchie should assist in the trial of cases "growing out of the transactions hereinafter mentioned in which the government is interested" and then referred to certain specific criminal statutes as well as "other criminal laws of the United States" [emphasis added]. Assuming arguendo that a narrowly drawn letter could validly restrict the scope of a grand jury inquiry, this was not such a document. The reference to violations of "other criminal laws," rather than being surplusage as the opinion in O'Gorman, supra suggests, shows that the list of statutes was merely illustrative of some of the known violations starting from which a productive grand jury investigation might develop. The letter did not purport to limit investigations to only the listed offenses. The Assistant Attorney General's choice of words demonstrates that he expected a wide-ranging grand jury inquiry unencumbered by the artificial boundaries of particular statutory sections.

Even if the enumerated statutes constituted the special attorney's primary area of inquiry, the additional words "other criminal laws of the United States" indicated a secondary area of investigation. See In re Grand Jury Subpoena to Patriarca, Misc. No. 75-57 (D. R.I. April 22, 1975). The reason for the broadening phrase is readily apparent. As this Court observed in Persico, organized

crime is "like a chameleon" and a definative list of all the crimes to be prosecuted by the Strike Forces "would require specification of almost every crime in Title 18" (slip op. 4178). Moreover, it is impossible for an attorney assigned to conduct a grand jury investigation to know the outcome of that investigation until the grand jury has heard all the witnesses and examined all the evidence brought before it. As a grand jury investigation progresses, the charges may broaden or a person under suspicion may be cleared. The Persico decision recognized that this is precisely the purpose of the grand jury process. See Blair v. United States, 250 U.S. 273 (1919). Limiting the grand jury's authority to indict to the specific statutes set out in the Strike Force attorney's letter could only serve to thwart the legitimate ends of the grand jury system. In the words of this Court's opinion in Persico (slip op. 4156):

> the proceeding would be restricted to the area of the authority of the Justice Department lawyer; questions by jurors themselves outside these bounds would be out of order. It would inhibit its freedom "to pursue its investigations unhindered by external influence or supervision . . . ." United States v. Dionisio, 410 U.S. 1, 16-17 . . . (1973).

Beyond this, even if the attorney's authority under the letter is considered to be restricted to the statutes

particularized, there is no reason to conclude that the attorney had no authority to conduct the inquiry here. His authority is not "embodied in a single written authorization" (Persico, supra 4179). He also acted under "oral directions transmitted through a chain of command within the Department" (Ibid.), and there is no basis here to assume that he exceeded his authority. This is especially so because the United States Attorney signed the indictment. 3/ That in itself shows that the attorney involved was authorized to act and was assisting the United States Attorney within the broad authority given to the Attorney General under 28 U.S.C. §§ 542 and 543(a) to appoint attorneys to assist United States Attorneys. See Persico, supra, 4156-4157.

As a regular attorney of the Department of Justice employed by the Criminal Division and assigned to the Division's Organized Crime Strike Force, prosecutor Ritchie is an "attorney for the government" within the meaning of Rules 6(d) and 54(c), Fed.R.Crim.P., and is authorized to appear for the government before the grand jury. The

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3/Rule 7(c)(1), Fed.R.Crim.P., provides that an indictment "shall be signed by the attorney for the government." The United States Attorney signed the instant indictment, which is common practice. As long as the indictment was signed by a government attorney within the meaning of Rule 54(c), Fed.R.Crim.P., defendant has no basis to challenge the validity of the government attorney's authorization.

rules of criminal procedure limiting appearances before grand juries are inapplicable to him. See Persico, supra, 4179-4180. As the court stated in United States v. Kazonis, No. 74-238-S (D. Mass., March 25, 1975):

> Historically, the prohibition against 'unauthorized persons' [in the grand jury] has not focused on the prosecuting attorney at all. In England, the source of the rule, prosecutions were typically commenced by private individuals rather than the Crown. Such an individual was referred to as 'the prosecutor.' . . . . 'The grand jury set by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted.' . . . The tradition of the common law thus accomodated the presence in the grand jury of any lawyer chosen by the individual prosecutor for the purpose of presenting the evidence, without regard to his particular commission or authority. The presence of the Special Attorney is clearly no violation of a fundamental rule but is in accord with an ancient tradition. [Slip op. at 2-3, emphasis in the original, citations omitted].

See also May v. United States, 236 Fed. 495, 500 (8th Cir. 1916). Departmental attorneys, especially those with duties like Ritchie's, can never be unauthorized persons before the grand jury; they are in no way similar to persons who have no right at all to appear before the grand jury, whose presence would likely violate the principle of grand

jury secrecy. Compare United States v. Carper, 116 F.Supp. 817 (D.D.C. 1953) (deputy marshals guarding witness).

2. In any event, even if attorney Ritchie was not authorized to conduct an inquiry resulting in an indictment under 18 U.S.C. 922, there is no reason to dismiss the indictment. Underlying defendant's claim in this case is a basic challenge to his prosecution being conducted by a Strike Force attorney as opposed to an attorney from the local United States Attorney's office. However, the decision as to who will represent the government in a given proceeding is an internal decision of the Department of Justice which is of no concern to this or any other criminal defendant. A defendant's right to a fair grand jury proceeding is in no way prejudiced by the scope of authority of the particular attorney assigned to appear before the grand jury by the government on its behalf. But beyond this lack of prejudice, there is no more reason to dismiss an indictment on this ground than there would be to dismiss on the ground that there was inadequate or incompetent evidence before a grand jury. Such a challenge "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." Costello v. United States, 350 U.S. 359, 364 (1956). Allowing a criminal defendant to

challenge the authority of an attorney assigned by the government to conduct a grand jury investigation can only serve to impede the investigative power of the grand jury, which, as the Supreme Court has stated, "must be broad if its public responsibility is adequately to be discharged." United States v. Calandra, 414 U.S. 338, 344 (1974). It would also circumscribe the powers of the grand jury to conduct an inquiry and return indictments despite the fact that the Supreme Court ruled that such an inquiry may not "be limited narrowly by . . . forecasts of the probable results of the investigation." Ibid., at 343; Blair v. United States, supra, 250 U.S. at 282.

Whether a particular attorney is authorized to represent the United States before a grand jury is a matter of concern only to the Attorney General and not to a particular criminal defendant. Only the Attorney General or his lawful designee would have grounds to challenge the actions of an attorney appearing on the government's behalf. The issue here falls into the category of an internal "housekeeping" provision of the Department of Justice. If a letter indicating the authority of a particular government attorney should have been worded differently, this is a matter over which a defendant should have no right to complain. The situation here is closely analogous to that which the

Supreme Court encountered in Sullivan v. United States, 348 U.S. 170, 173 (1954), where, in discussing an Executive Order with which the United States Attorney had failed to comply, the Court stated:

> It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction.
>
> The evidence was presented by the District Attorney, who was a representative of the Department of Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence.

Cf. Watts v. United States, ____ U.S. ____ (decided June 23, 1975) (No. 74-1168) (Berger, C.J., dissenting); United States v. Hutul, 416 F.2d 607, 626-627 (7th Cir. 1969).

In sum, any deficiency in the scope of the letter here is a matter to be dealt with by the Attorney General, who is responsible for the organizational and jurisdictional divisions within the Department of Justice (see 28 C.F.R. §0.5, 0.55, and 0.60); it neither causes an unauthorized person to be present in the grand jury room, creates a defect in the indictment, nor prejudices the defendant--

especially since the letter is merely indicia of the special attorney's authority and not the sole basis for it.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for the United States has this day been mailed to counsel for appellant at the following address:

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